STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for approval of delivery services tariffs and tariff revisions and of residential delivery services implementation plan, and for approval of certain other amendments and additions to its rates, terms, and conditions	: : : : :	No. 01-0423

JOINT REPLY BRIEF ON EXCEPTIONS OF THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO, CENTRAL ILLINOIS LIGHT COMPANY, COMMONWEALTH EDISON COMPANY, CONSTELLATION NEWENERGY, INC., MIDAMERICAN ENERGY COMPANY, NATIONAL ENERGY MARKETERS ASSOCIATION, PEOPLES ENERGY SERVICES CORPORATION, AND TRIZECHAHN OFFICE PROPERTIES, INC.

The Building Owners and Managers Association of Chicago, Central Illinois Light Company, Commonwealth Edison Company ("ComEd"), Constellation NewEnergy, Inc. (f/k/a AES NewEnergy, Inc.), MidAmerican Energy Company, National Energy Marketers Association, Peoples Energy Services Corporation, and TrizecHahn Office Properties, Inc. (collectively, the "Joint Parties"), by their respective attorneys, submit this Joint Reply Brief on Exceptions, responding to the Briefs on Exceptions of the Illinois Commerce Commission (the "Commission") Staff, the Illinois Attorney General's office (the "AG"), the Illinois Industrial Energy Consumers (the "IIEC"), and the "Government and Consumer Intervenors" or "GCI"[1]. The Administrative Law Judge's Proposed Order (the "ALJPO") is lawful and supported by the evidence, and it should be adopted by the Commission.[2]

[1] The City of Chicago, the Citizens Utility Board, and the Cook County State's Attorney's Office.

[2] Should the Commission decide to enter the ALJPO, ComEd and the other Joint Movants (the Joint Parties, GCI, and certain non-parties) will support the jurisdictional revenue requirement included therein, including the additional $5,771,000 downward adjustment for storm restoration costs and the $3,529,000 disallowance of ComEd's R&D expenses.

I.
Introduction

The Joint Parties ask the Commission to enter an Order based entirely on the record evidence in this proceeding. While it is true that the Joint Parties and others, such as GCI, have all agreed to support a common proposed order[3] that they strongly believe is just and reasonable and provides substantial benefits to all stakeholders, they do not ask the Commission to approve a "settlement agreement," or to base any of its findings or determinations on the agreement among them. Rather, each and every determination made in the ALJPO is supported by substantial evidence in the record, nearly all of which has been before the Commission for weeks and months, and in many cases since 2001. Moreover, the lion's share of those determinations relate to issues that the Commission has had under active consideration since more than a year ago, when it began considering the Interim Order.

As is discussed below in more detail, the process of reaching the Commission's decision has complied scrupulously with all requirements of due process, the Public Utilities Act, the Administrative Procedure Act, and the Commission's own rules. No party was denied notice, the right to present testimony, the ability to conduct discovery, or the right to conduct cross-examination. With the sole exception of the Phase II evidentiary hearing transcript, the testimony and other record evidence on the issues which the Commission is called on to decide have been on file for at least weeks, if not months, and in many cases since 2001.

While the ALJPO stands on its own, the Joint Parties uniformly recognize the importance of the Commission acting in this Docket on a schedule in synch with the other

[3] This proposed order, hereinafter the "Joint Proposed Order," was attached as Exhibit A to ComEd's March 5, 2003, motion and thereafter was amended on March 18, 2003, principally to reflect accurately the Commission's subsequent actions. The Joint Movants (the Joint Parties, GCI, and certain non-parties) supported the Joint Proposed Order. All of the Joint Movants now support the ALJPO as well.

dockets addressing ComEd's market value index ("MVI") and revisions to its Rate HEP[4], which is the reason that the Joint Movants requested that orders be entered in each of the subject dockets by March 28, 2003. These proceedings directly affect the terms and prices under which customers can take delivery services from ComEd and the terms under which retail electric suppliers ("RESs") can offer competitive supply of power and energy to those customers. The reality of the Illinois retail electric market is that only a contemporaneous and prompt resolution of these three dockets will facilitate market stability and the development of an efficient competitive retail market. Both customers and suppliers need to know and have confidence in the results of all three of these proceedings in order to identify the prices, CTCs, and the potential for savings in the upcoming summer months. Customers and RESs need all this information in order to remove the uncertainty that otherwise would cloud their long-term supply decisions. There is nothing improper in the Commission recognizing this plain fact. It is significant that, even parties raising issues regarding the schedule in this proceeding (such as the AG and IIEC) do not advocate delay of the Commission's decision in this proceeding. They comment on the process and they propose additional language for the order, but they do not seek to block the Commission from acting in a timely manner.

Historically, the Commission has welcomed consensus recommendations arrived at by groups of litigants, and they are presented routinely. Such recommendations are neither illegal, nor invitations to base a decision on anything other than on the record. It is, rather, for the Commission to determine if the record supports the jointly-supported ALJPO, Judge O'Connell-Diaz's Post-Exceptions Proposed Order, or some other resolution. The Commission alone can accept the many concessions that the Joint Movants have made and enter

[4] Docket Nos. 02-0656, *et. al* (Consol.) and 02-0479, respectively.

an appropriate Order based upon the evidence in the record. The result will be a rate base and revenue requirement that are lower than ComEd might obtain if it pursued a resolution that rejects all of the Liberty recommendations that ComEd's testimony questions. The alternative -- to reject a proposed order that is based on the evidence -- will result in further proceedings to reach a decision in this case -- in all probability long after the summer season and, most importantly, *long after the time when customers and market participants must make decisions about their electric service*. Indeed, every significant factor that the Commission ordinarily considers when reaching its decisions points to approval of the ALJPO as the proper result. The ALJPO's proposed findings of fact are supported by the record. The ALJPO's proposed conclusions are supported by the law. Their substance is supported by a broad coalition of customers, market participants, governmental bodies and ComEd, many of whom do not often see eye to eye. And, as is discussed in more detail herein, the only parties that question this result do so based on a mischaracterization of the Joint Movants' proposals or an erroneous view of the record.

Here, the Commission has an extraordinary opportunity to decide this case on the record in a way that proponents of widely differing interests all believe will be beneficial. The Commission should take this opportunity.

II.

Procedural Exceptions and Issues

A. The Manner In Which The Phase II Proceedings Are Being Completed Comports Fully With Due Process and Ensures Reasonable Decision-Making.

Staff and IIEC vaguely suggest that the expedited schedule for completing Phase II of this proceeding has limited their ability to file additional and more detailed Exceptions, without providing any specifics. (Staff BoE at 1, IIEC BoE at 1). Staff also suggests more generally that the expedited schedule "is similar to one the Illinois Supreme Court found to 'skirt[] the edge of a due process violation' in *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E.2d 639, 144 Ill. Dec. 334 (1990)." (Staff BoE at 1). The AG, although stating that "the Commission has no authority to waive the due process rights of other parties to the proceeding" (AG BoE at 4), primarily focuses on the adequacy of the Commission's own deliberative process when it argues that "an informed determination [by the Commission] of the facts may be rendered impossible in such an abbreviated period of time." (AG BoE at 5; see also AG BoE at 4 ("In granting the Motion filed by ComEd and supported by the Joint Movants, the Commission has endorsed a process that may fall short of an independent investigation of the results of the evidence"); AG BoE at 11 ("Consideration of the instant case on the merits may be impossible on a limited schedule")). Each of those arguments is incorrect.

The AG's argument that there may not be sufficient time for the Commission adequately to address the issues in these proceedings ignores the context of this case. This is the tail end of extensive litigation in this Docket spanning over twenty-two months. Phase I was fully litigated between June 1, 2001, and April 1, 2002, at which time the Commission issued a 154-page Interim Order. We are now at the end of Phase II, which were concerns a sharply reduced set of issues. Indeed, the Liberty Consulting Group's ("Liberty") audit report (the "Audit Report") and the further evidence received in Phase II of this case served to augment, not replace, evidence already in the record on issues, such as revenue requirement and rate design, that were raised and explored in detail in Phase I. In a very real sense, the only thing new here is that a critical mass of parties representing a broad spectrum of interests – consumers, governmental bodies, competitive suppliers, commercial interests, and ComEd – have recommended a decision on the issues that is supported by the evidence in the record.

Moreover, by the time the Commission makes its decision, it will have had an extensive opportunity to consider the evidence bearing on every issue now before the Commission for decision. The Commission has extensive experience with rate cases, and this is the second DST rate case in less than four years, just for ComEd. In addition, the Commission has been actively involved in all aspects of these proceedings from the beginning. The Commission has been directly involved in scheduling, has received status reports, and has already issued a 154-page Interim Order that considered the vast majority of issues to be decided. Thus, the AG's suggestion that the Commission cannot possibly deliberate effectively on the 152-page ALJPO (which in numerous respects simply overlaps the Interim Order) in the time allotted (AG BoE at 11) is incorrect.

As to due process, the Staff, IIEC, and the AG have not identified issues they were not able to address as a result of the schedule, whether in Exceptions or otherwise. But even if they had, their due process claims would be without merit. Due process requires only reasonable notice and an opportunity to be heard. *See Trettenero v. Police Pension Fund of City of Aurora*, 333 Ill. App.3d 792, 798-99 (2nd Dist. 2002). These requirements have been met.

First, parties had ample opportunity to present testimony on these issues in Phase II. Every party had the opportunity to submit direct testimony on February 3, 2003. Every party had the opportunity to submit rebuttal testimony on February 28, 2003, but only ComEd, GCI, and Staff chose to do so. Only ComEd had the right to file reply testimony, which it did on March 10, 2003, eleven days earlier than was called for under the original schedule. Thus, no party could seriously contend – and neither Staff nor IIEC nor the Attorney General appears to contend – that it has been denied an opportunity to understand, formulate, and advocate its position on the issues in Phase II.

Second, the time afforded Staff, IIEC, and the AG to review the Joint Proposed Order (nearly two weeks), and ComEd's reply testimony (one week) before the evidentiary hearing was more than sufficient to prepare for those hearings, particularly in light of past Commission practice. The one week time span between the March 10, 2003, filing of ComEd's reply testimony in Phase II and the evidentiary hearing on March 17, 2003, is the same as the time span between last-filed testimony and the start of the evidentiary hearing in ComEd's first delivery services rate case (Docket No. 99-0117), where the issues were far more numerous, complex, and novel, and only one day less than the time span between last-filed testimony and the evidentiary hearing in Phase I of the instant proceedings. Thus, the AG's claim that the Commission has somehow departed "from its usual practices" in granting the expedited schedule (AG BoE at 7) is without merit. Review of the ALJPO has also been made easier by the fact that that order largely reflects and relies on Phase I testimony submitted in 2001 and Phase II testimony submitted in February 2003.

Third, one day of Phase II evidentiary hearings was more than sufficient for parties to cross-examine adverse witnesses. IIEC, the AG, and Staff asked to cross-examine only three witnesses, and that cross-examination totaled less than three hours. None of these parties were denied the right to cross-examine any witness, none were prevented from completing any cross-examination that they had, and none made any offer of proof of additional issues they might have explored if they had had more time to prepare and conduct cross-examination.

Fourth, there is no prescribed interval between the conclusion of evidentiary hearings and the entry of an Order by the Commission.[5] The only legally required steps are the issuance of a proposed order by the ALJ and the opportunity for parties to submit Exceptions to that proposed order. Staff, IIEC, and the AG have all filed Exceptions in accordance with the schedule approved by the ALJ. None of these parties specifically identifies a single additional Exception or argument they allegedly would have made had there been more time. In addition, the schedule in this proceeding permits parties to file Reply Briefs on Exceptions – a step that is not required by law, but which the Staff requested and the schedule adopts.

Staff's suggestion that the schedule now being followed by the Commission is somehow analogous to the Commission action that the Court in *BPI I* declared "skirts the edge of a due process violation" (136 Ill.2d at 237) is incorrect. In *BPI I*, the Commission, in its Sixth Interim Order, had determined the "minimum" rate base values of the Byron 2 and Braidwood 1 nuclear units and then provided that in subsequent hearings, ComEd would have "an additional opportunity to prove larger rate base values," but intervenors would not have "an additional opportunity to prove lower base values." (136 Ill.2d at 236). In this context, the Court held:

> Edison received more time to prove its position, but the intervenors did not. This action by the Commission skirts the edge of a due process violation.

(136 Ill. 2d at 237). No such asymmetry applies here.

The AG cites *People ex rel. Gilbert v. Hurley*, 336 Ill. App. 205, 218, (1st Dist. 1948) and *Gigger v. Board of Fire and Police Comm'r*, 23 Ill. App. 2d 433, (4th Dist. 1959).

[5] In a separate letter to the Commission, dated March 24, 2003, the AG complains that neither the schedule originally proposed by the Joint Movants on March 11, 2003, which did not provide for briefs following evidentiary hearings and before the ALJPO, nor the amended schedule the Joint Movants proposed on March 14, 2003, which provided for one round of briefing between hearings and the ALJPO, "afforded the parties a reasonable amount of time to present their arguments." In its Brief on Exceptions, however, the AG concedes, as it must, that "the Commission's rules do not require that the parties be given an opportunity to file briefs" between the close of evidentiary hearings and before a Proposed Order is issued. (AG BoE at 6-7). Moreover, the AG declined to avail itself of the opportunity to file such a brief when that was proposed by the Joint Movants. Tr. 3757-59.

(AG BoE at 8). Neither case concluded that an amended hearing schedule, or an allegedly short deliberation schedule, was unlawful. Nor do they stand for the proposition that the schedule in this Docket is so short as to cast any doubt about the ability of the Commission to consider the merits of the ALJPO. The AG also cites a federal case, *Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). (AG BoE at 10). *Calvert Cliffs* held that certain Atomic Energy Commission regulations were inconsistent with specific statutory requirements. No such question is posed here. Indeed, Illinois law affords the Commission wide discretion in shaping and conducting proceedings and hearings (*e.g.,People of Cook County, ex rel. O'Malley v. Illinois Commerce Comm'n*, 237 Ill. App. 3d 1022, 1030 (1st Dist. 1992)), including their scheduling.

The AG also cites (AG BoE at 9-11) several cases for general propositions concerning the Commission's oversight of public utilities, specifically *People v. City of Chicago*, 349 Ill. 304 (1932); *Local 777, DUOC, Seafarers Int'l Union of N. Am. v. Illinois Commerce Comm'n*, 45 Ill. 2d 527 (1970); *Camelot Utilities Inc. v. Illinois Commerce Comm'n*, 51 Ill. App. 3d 5 (1st Dist. 1995); *Citizens Utility Board v. Illinois Commerce Comm'n*, 276 Ill. App. 3d 730 (1st Dist. 1995); *City of Champaign v. Illinois Commerce Comm'n*, 141 Ill. App. 3d 457 (4th Dist. 1986); *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill. 2d 1 (1994); *Citizens Util. Bd. v. Illinois Commerce Comm'n*, 291 Ill. App. 3d 300 (1st 1997). None of those cases establishes that the schedule or any other procedure at issue here is legally erroneous or violates due process.

Finally, the AG has previously directed the Commission's attention to the decision in *Piotrowski v. State Police Merit Bd.*, 85 Ill. App. 3d 369 (5th Dist. 1980), as indicative of the obligations imposed by due process. The Court in *Piotrowski* stated that: "Due process of law is served where there is a right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence which is offered." *Piotrowski*, 85 Ill. App.3d at 373. Each of those rights has been provided to each party in this proceeding. Due process requires no more.

B. The ALJPO Does Not Rely On The Joint Movants' Agreement And The AG's And IIEC's Exceptions Concerning That <u>Agreement Are Inaccurate And Should Be Rejected</u>

IIEC argues that the "Proposed Order fails to completely describe and discuss the ComEd Motion [filed on March 5, 2003,], the stipulation attached thereto and the underlying agreement (IP Ex. A), which forms the basis for the settlement recommended by ComEd and its supporters of this proceeding and the separate and unrelated proceedings …." (IIEC BoE at 2). The AG makes similar arguments. (AG BoE at 12-13, Ex. A). Both the AG and IIEC err in several respects, and their Exceptions should be rejected.

First and foremost, no Joint Movant is asking that the Commission approve any settlement. Nor is the Commission being asked rely on the agreement of the various parties admitted as Illinois Power ("IP") Exhibit [("Ex.")] 1 in entering its Order. Nor do the stipulations of the Joint Movants and the underlying agreement form any basis for the ALJPO. Both the Motion filed by ComEd on March 5, 2003 (the "March 5 Motion"), and the briefs filed by the Joint Movants make clear that they are solely asking the Commission to act on the evidence in the record. (*E.g.*, March 5 Motion at ¶ 12; Joint Reply at 1-3). The fact that the Joint Movants are doing so jointly does not make their request one to act on or approve a settlement agreement or a stipulation.

IIEC's attempt to introduce language suggesting that the Commission must decide this case rapidly because the agreement among the Joint Movants calls for it (IIEC BoE at 3) is inaccurate and invites the Commission to mischaracterize its actions. The Commission should act promptly and in concert in this Docket, the MVI Docket, and the HEP Docket because doing is in the public interest. The reality of the Illinois retail electric market is that the issues in the MVI and HEP Dockets do intertwine with those raised in this Docket. By acting simultaneously in these Dockets, the Commission will bring much-needed stability to the market and promote an effectively competitive electricity market. (*See* 220 ILCS 5/16-101A(d).) The Commission should expressly act on this basis and not on the (incorrect) belief that the Joint Movants have argued that the Commission should so act because their agreement calls for it.

Moreover, while the stipulations were drafted in terms of a specific order, the Joint Movants have made clear that the stipulations will remain valid and the Joint Movants will continue to support the March 5 Motion if the Commission approves the ALJPO or its substantive equivalent as well. But, even were this not true, that would not render the Commission's action dependent on, or an approval of, the stipulations. The fact, however, is that the ALJPO is supported by the record and that is why the Commission should act in conformance with it.

The AG also argues for the inclusion of great detail about the Joint Movants' agreement, without even attempting to establish that it forms the basis of any decision of the Commission. (AG BoE at 12-13, Ex. A). Fundamentally, the details of the Joint Movants' agreement among themselves are not relevant to the decision of this Docket and, as with the efforts of IIEC, the Commission should be loath to create the inaccurate impression that it is acting based on that agreement. The AG knows that there is nothing improper about coalitions agreeing to propose joint resolutions to issues before the Commission. Indeed, in the last ComEd rate case (Docket No. 99-0117), the AG was a leading member of the *ad hoc* "Federation for Real Electric Energy COMpetition (FREE.COM)" which, 22 days *after* the evidentiary hearing was concluded, submitted a Joint Proposed Order that, among other things, proposed resolutions of issues as to which members of that coalition previously expressly had disagreed. Why the AG agreed to support that proposed order and what other terms the AG agreed to as part of the arrangement were not issues before the Commission. The question was: Was the joint proposed order supported by the facts and the law? The same question is posed here.

In addition to the AG and IIEC addressing in general the terms of the Joint Movants' agreement, IIEC notes (IIEC BoE at 4-5) that various parties to it, including ComEd, agree therein to private, contractual limitations on their individual ability to, in the future, request the Commission change ComEd's rates. IIEC asks that this fact be discussed in the Commission's Order in an apparent attempt to gin up an argument that this case is like that which was addressed in *BPI I*. It is not, and the Commission should avoid attempts to inaccurately portray it as being so. In this case, no party asks the Commission to adopt, approve, or enforce any rate moratorium or freeze. The Joint Movants do not asks the Commission to limit, in any way, the Commission's authority to change ComEd's rates. Nor does any party ask the Commission to take any action because of the parties' private contractual agreement concerning future requests to change rates. Furthermore, the Commission need not, and should not, rely on this agreement to reach or support any conclusion in its Order. There is, accordingly, no rationale for citing to this feature of the agreement in connection with the Commission's rationale for its Order. And, contrary to IIEC's claim, the fact that certain parties may voluntarily agree as to how they may behave with respect to their right to seek or not seek rate changes in the future has no bearing whatsoever on whether the rates now before the Commission are just and reasonable or cost-based and supported by the record evidence, and whether the terms of the final Order are fully within the Commission's lawful authority to adopt.

III.

<u>Substantive Exceptions</u>

A. The ALJPO's Determination Concerning A&G Expenses Is Correct

The AG challenges the ALJPO's determination that ComEd's A&G expenses should be functionalized in accordance with ComEd's A&G expense study. (AG BoE at 13-15, Ex. B). The ALJPO's ruling is unquestionably supported by the record and the Exception on this issue should be rejected.

1. The ALJPO Correctly Approves ComEd's Accounting For A&G Expenses

The ALJPO correctly approves ComEd's accounting for its A&G expenses based on the evidence in the record from both Phase I and Phase II of this Docket. (ALJPO at 68-75). 220 ILCS 5/10-103, 10-201(e)(iv). While the AG takes exception to this finding, it does not (and cannot) argue that the ALJPO's findings are not based on substantial evidence in the record. In fact, the ALJPO recites specific evidence from both Phase I and Phase II that compels its findings on this subject. (ALJPO at 68-69, 72-75). By contrast, while the AG stresses that "[t]he Commission must consider the evidence in this case on the merits" (AG BoE at 3), the AG's BoE and proposed language (AG BoE at 13-15, Ex. B) cite <u>no</u> specific evidence on this subject, much less any evidence that supports its exception. The AG instead argues that the ALJPO's approval of ComEd's accounting for its A&G expenses is "improper", based on findings in the Interim Order in this Docket, findings in *In re Commonwealth Edison Co.*, Docket No. 99-0117 (Order Aug. 26, 1999), and an alleged internal inconsistency in the ALJPO. (AG BoE at 13, *et seq.*). The AG's arguments are erroneous and do not support its exceptions.

First, the ALJPO's findings concerning the functionalization of ComEd's A&G expenses are supported by the evidence[6]. Indeed, the evidence in both Phase I and Phase II of this Docket, which is extensive, detailed, and compelling, permits no other conclusion. In June and July 2001, nearly two years ago, ComEd provided a detailed 10-page summary and explanation of its A&G expenses study, which included discussion of each individual FERC A&G Account (Hill Phase I ["Ph. I"] Direct ["Dir."], ComEd Ex. 4.0 CR, App. B CR); the 55-page A&G expenses study itself (ComEd Cross Ex. 29.0); and a 27-page analysis of the allocators used in the study (Hill Ph. II Dir., ComEd Ex. 112.4). (Hill Ph. I Rebuttal ["Reb."], ComEd Ex. 23.0 CR at 5). Throughout this proceeding, <u>no</u> <u>party</u> in either Phase I or Phase II <u>identified</u> <u>even</u> <u>a</u> <u>single</u> <u>error</u> in ComEd's A&G expenses study. Even after ComEd witness Jerome Hill pointed out in his Phase II direct testimony that no party had done so (Hill Phase II ["Ph. II"] Dir., ComEd Ex. 112.0, pages 51, 60), no party submitted any rebuttal testimony claiming to identify any such error. However, the AG now asks that ComEd's jurisdictional revenue requirement be reduced by more than $60 million, without identifying any error in the A&G expenses study at all, let alone one that would warrant its complete rejection.

This is not a legal or "policy" issue. This is a *factual* issue about which of ComEd's A&G expenses support ComEd's provision of jurisdictional delivery services, and in what amounts. The AG's exception is unsupportable given the Commission's duty to decide this case based on the evidence in the record; indeed, it calls for the Commission to commit reversible error. 220 ILCS 5/10-103, 10-201(e)(iv).

[6] The approved accounting for ComEd's A&G expenses is based on a combination of: (1) direct assignment where the available data support accurate functionalization of specific A&G expenses; and (2) the use of allocators, including the general labor allocator, for all other A&G expenses, employing in each instance that allocator which best comports with the cost-causation of the particular category of A&G expenses in question. (*E.g.*, Hill Ph. I Dir., ComEd Ex. 4.0 CR at 17 and App. B CR at 1; Hill Ph. II Rep., ComEd Ex. 126.0 at 51).

Second, the AG's reliance on the Interim Order is without merit. The Interim Order identified only <u>one</u> specific category of A&G expenses as not being amenable to direct assignment: "CEO and executive salaries". (Interim Order at 68). The evidence is uncontradicted, however, that ComEd did not directly assign that category of expenses. ComEd's A&G expenses study allocated nearly 25% of its A&G expenses based on a labor allocator, including all "Executives" costs and all costs of the Office of the Chairman, the Office of the President, and the Office of the Executive Vice President. (*E.g.*, Hill Ph. I Surr., ComEd Ex. 45.0 at 15; Hill Ph. II Rep., ComEd Ex. 126.0 at 20). Moreover, the Interim Order itself illustrates that the fundamental premise of the argument for functionalizing all of ComEd's A&G expenses with an "across the board" allocator -- that <u>none</u> of ComEd's A&G expenses may be directly assigned -- is incorrect. (Houtsma Ph. II Dir., ComEd Ex. 110.0 at 4, 20; Hill Ph. II Dir., ComEd Ex. 112.0 at 54). The Interim Order itself rejected that premise when it direct assigned legal costs and research and development ("R&D") (including special projects) costs, which are A&G expenses. (Interim Order at 98-99, 100, 101-102).

In addition, the Interim Order (at 68) expressly recognized that further evidence would be received in Phase II on the subject of functionalization of A&G expenses. (Interim Order at 60). Contrary to the AG's implication (AG BoE at 13), substantial evidence submitted in Phase II showed that ComEd's accounting for its A&G expenses is correct, that no error has been shown in ComEd's A&G expenses study, and that the fundamental premise for use of an "across the board" labor allocator for all of these expenses is incorrect. (Houtsma Ph. II Dir., ComEd Ex. 110.0 at 3-4, 18-21; Hill Ph. II Dir., ComEd Ex. 112.0 at 3-4, 51, 53-54, 60-63; Hill Ph. II Rep., ComEd Ex. 126.0 at 4, 13-21). The Phase II evidence demonstrated those points in several respects, including the following:

- Since Phase I, the restructured balance sheets where ComEd's A&G expenses "reside" have been the subject of an annual independent audit by Pricewaterhouse Coopers that resulted in an unqualified opinion. (Hill Ph. I Dir., ComEd Ex. 112.0 at 3, 61-62; Hill Ph. II Rep., ComEd Ex. 126.0 at 20-21; *see also* Houtsma Ph. II Dir., ComEd Ex. 110.0 at 3-4, 19-20).

- In Phase II, ComEd presented additional testimony that the Interim Order (at 68) erred in concluding that ComEd had functionalized its A&G expenses in inconsistent manners in Docket No. 99-0117 and this case. (Houtsma Ph. II Dir., ComEd Ex. 110.0 at 18-19). Ms. Houtsma also pointed that, in the instant Docket, however, ComEd had superior and updated data on this subject. (*Id*.)

- The resulting A&G allocations are reasonable. Indeed, in Phase II, ComEd submitted evidence showing that its 2000 test year A&G expenseswere only 89% of the 10-year average of its A&G expenses, excluding incentive compensation. (Hill Ph. II Dir., ComEd Ex. 112.0 at 8-9; ComEd Ex. 112.2, Sch. 2; Hill Ph. II Rep., ComEd Ex. 126.0 at 13-14).[7] And, ComEd's 2001 jurisdictional delivery services cost comparison analysis shows that the level of A&G expenses that results from ComEd's A&G expenses study is reasonable. (Hill Ph. II Dir., ComEd Ex. 112.0 at 63-64; ComEd Ex. 112.3, Sch. 3).

- The Audit Report (Liberty Ex. 6.0) repeatedly demonstrates that individual A&G expenses may be reviewed in order to determine what caused those costs. While Liberty did not base disallowances of A&G expenses on functionalization, that does not alter the fact that if the cost-causation of such expenses can be determined, then it is illogical and incorrect to adhere to the unsupported premise that their cost-causation is inherently unknowable for functionalization purposes. (Houtsma Ph. II Dir., ComEd Ex. 110.0 at 4, 20-21; Hill Ph. II Dir., ComEd Ex. 112.0 at 3-4, 51, 53-54, 61; Hill Ph. II Rep., ComEd Ex. 126.0 at 4, 13-17, 19-20).[8]

- The very limited rebuttal testimony submitted by other parties on this subject showed no flaw in ComEd's accounting for its A&G expenses, refuted none of ComEd's points on this subject, did not provide any valid ground for adopting any "across the board" general labor allocator for all of ComEd's A&G expenses in this Docket, and failed to provide any valid reason for asking the Commission to ignore the combined evidence presented on this subject by ComEd in Phase I and Phase II. (Hill Ph. II. Rep., ComEd Ex. 126.0 at 4, 14-21).

[7] Staff itself showed in Phase I that ComEd's proposed A&G expenses based on an adjusted 2000 test year in this Docket had increased by only 8.41% from what ComEd proposed in Docket No. 99-0117 based on an adjusted 1997 test year (Lazare Ph. I Reb., Staff Ex. 21.0, Sch. 21.1), and that is before factoring in inflation, customer growth, load growth, or any other change over those three years.

[8] Also, since Phase I, the FERC has made clear that it is not inflexibly committed to use of the general labor allocator. *In re Central Illinois Light Company*, 98 FERC ¶ 61,242 (March 1, 2002).

Third, the AG's heavy reliance on the use of an "across the board" general labor allocator in Docket No. 99-0117 (AG BoE at 13, *et seq*.) is misplaced. The AG's BoE makes the related suggestion that the ALJPO's determination on this issue therefore may be subject to less deference to the extent that it "drastically departs from past practice." (AG BoE at 14-15). The AG's arguments here, too, are without merit for several reasons.

The argument that the Commission has consistently adopted the general labor allocator for functionalization purposes is irrelevant -- because what is at stake is a *factual* question about ComEd's costs to be decided based on the evidence in the record. The Commission must base its decision here on the evidence in the record in this Docket, not that of any other docket. 220 ILCS 5/10-103, 10-201(e)(iv). Indeed, Staff testified that: "[N]othing prevents the Staff, or any party for that matter, from arguing similar or identical positions before the Commission, even when those positions have been decided against it in a prior docket." (Borden Ph. I Reb., Staff Ex. 25.0 at 2:41-46).

Moreover, Commission precedent on this issue is not consistent. (Hill Ph. II Rep., ComEd Ex. 126.0 at 18-19). As noted above, the Interim Order approved direct assignments. The Order in Docket No. 99-0117, like the Interim Order, only identified one category of A&G expenses as not being amenable to direct assignment, "CEO and executive salaries", and the Order simultaneously recognized that "direct assignment may be a better method" for other costs. *In re Commonwealth Edison Co.*, Docket No. 99-0117 at 27 (Order, Aug. 26, 1999). Also, the Order in Docket No. 99-0117 did not adopt the general labor allocator for ComEd's Intangible Plant. (*See* Lazare Ph. I Reb., Staff Ex. 21.0 at 13:263-14:275). In addition, the Order on Rehearing in Docket No. 99-0117 accepted ComEd's evidence directly assigning certain costs that had been recorded in FERC "sales and marketing" Accounts 911 and 912. *In re*

Commonwealth Edison Co., Docket 99-0117 (Order on Rehearing, March 9, 2000). And, perhaps most importantly, the evidence is uncontradicted that ComEd's A&G expenses study in the instant Docket was supported by more recent and superior data than that presented in Docket No. 99-0117. (*E.g.*, Hill Ph. I Dir., ComEd Ex. 4.0 CR, App. B at 2; Hill Ph. I Sur., ComEd Ex. 45.0 at 5-6; Houtsma Ph. II Dir., ComEd Ex. 110.0 at 18-19).

Furthermore, as the ALJPO correctly points out (at 75), the Commission, in *In re Illinois Commerce Comm'n On Its Own Motion v. Central Illinois* Light *Co., et al.*, Docket No. 99-0013 at 44 (Order, Oct. 4, 2000), over a year after its Order in Docket No. 99-0117, found in part that: "As a general proposition, the Commission believes that direct assignment of costs is superior to the application of general allocators if the costs are suited to direct assignment and sufficient cost data is available to make direct assignments…." The reference to that Docket should not be deleted. (AG BoE, Ex. B at 3).

Finally, the ALJPO's approval of ComEd's accounting for its A&G expenses is not inconsistent with the ALJPO's approving Staff's "across the board" modified general labor allocator for General Plant and Intangible Plant (AG BoE at 13, *et seq.*). The ALJPO expressly finds that the evidence in the record warrants approval of ComEd's accounting for its A&G expenses notwithstanding the rulings as to General Plant and Intangible Plant. (ALJPO at 73-74). In sum, the evidence in the record requires approval of the ALJPO's treatment of A&G expenses. The AG's exceptions, and its proposed language, should be rejected.

2. IIEC's Proposed Language Changes Regarding Functionalization Of A&G Expenses Should Be Rejected

IIEC theorizes, without citation, that "in the future, once legacy costs associated with ComEd's prior generation responsibility have worked their way off ComEd's books, it may be possible that direct assignment of such costs could yield a result similar to those of the labor allocator methodology previously adopted by the Commission" (IIEC BoE at 6); and proposes language that would distort the Commission's conclusion to make it largely rely on IIEC's theorizing and on the agreement between various parties (IP Ex. 1.0). (IIEC BoE atat 5-6). IIEC's theory and proposed language are contrary to the evidence and should be rejected.

In contrast to the evidence supporting the ALJPO, IIEC's BoE does not cite a single specific piece of evidence. IIEC cites only to its Phase I Brief on Exceptions (at 7-10), but IIEC's arguments in that prior brief were without merit (*e.g.*, ComEd's Phase I Reply Brief on Exceptions at 80-87) and, of course, necessarily fail to address the substantial additional evidence presented on this subject in Phase II. In particular, IIEC cites no evidence for the incorrect proposition that ComEd's jurisdictional A&G expenses as identified by the A&G expenses study approved by the ALJPO include any "generation" costs. Nor was any such evidence cited in IIEC's Phase I Brief on Exceptions.

Moreover, there is no proper ground for IIEC's seeking to insert a discussion of the agreement between ComEd and certain other parties into the Commission's conclusions on the subject of A&G expenses functionalization. (IIEC BoE at 6). The agreement has no bearing on this issue. Neither ComEd nor any other party to the agreement has asked the Commission to approve the agreement. No party to the agreement has asked the Commission to base any finding on this or any other subject on the agreement. IIEC's language therefore creates the inaccurate impression that the agreement formed some basis of the Commission's ruling on this issue. The Commission should reject this effort and IIEC's proposed language.

B. The ALJPO Correctly Addresses Capitalization Of Incentive Compensation

The ALJPO correctly provides for the capitalization of $9,835,0000 of incentive compensation expenses that the Audit Report recommended removing from operating expenses based solely on the ground that they should be capitalized. (ALJPO at 29, 57, 61, 122,-25). The AG's Exception on this subject (AG BoE at 16-17, Ex. C) is without merit. On this question, the Audit Report is clear and uncontradicted. (Liberty Ex. 6.0 (the Audit Report) at II-1, II-12).

> Liberty recommends that the ICC make an additional downward adjustment of $9,834,700 to distribution O&M to remove the amount of incentive compensation that ComEd should have charged to capital additions. Liberty based this adjustment on the fact that ComEd intends to capitalize a portion of incentive compensation from 2001 forward. Prior to 2001, ComEd did not capitalize any incentive compensation. However, goals that formed the basis for incentive compensation included matters such as completing summer-critical projects. This makes capitalization of a portion of incentive compensation appropriate. In 2001, the Company capitalized a total of $20,053,000 in incentive compensation. The capitalized portion of incentive compensation can be derived by dividing the total capitalized labor of the previous year by total labor of the previous year to determine a capital percentage.

(Liberty Ex. 6.0 at II-12).

The Audit Report erroneously omitted, however, to make a corresponding upward adjustment to ComEd's gross rate base of $9,835,000 to reflect the capitalization Liberty deemed "appropriate" -- an error that, if uncorrected, would mean that ComEd would be denied all recovery of these costs even though no party, nor Liberty, contended, much less showed, that these costs should not be recovered. (Hill Ph. II Dir., ComEd Ex. 112.0 at 10-11, 29-30; Hill Ph. II Reb., ComEd Ex. 126.0 at 2, 8).[9] ComEd accordingly took the position in its Phase II direct testimony that Liberty's proposed *pro forma* adjustment should be approved, but only if both sides of the adjustment were recognized and the corresponding upward adjustment to ComEd's

[9] Liberty's *post hoc* rationalization for not including the corresponding rate base addition in its Audit Report disregards the basic rules regarding *pro forma* adjustments, and was without merit. (Hill Ph. II Dir., ComEd Ex. 112.0 at 10-11; Hill Ph. II Reb., ComEd Ex. 126.0 at 8).

gross rate base of $9,835,000 were implemented. (Hill Ph. II Dir., ComEd Ex. 112.0 at 10-11, 29-30).

The parties presented no evidence to the contrary. While GC[10] witness David Effron did not support Liberty's *pro forma* adjustment (Effron Ph. II Dir., GC Ex. 7.0 at 15-17; Effron Ph. II Reb., GC Ex. 8.0 at 10), Mr. Effron did not question that if these actual costs were removed from operating expenses on the grounds that they should be capitalized, then they must be added to ComEd's gross rate base. Indeed, he testified that "it might be appropriate to capitalize a portion of incentive compensation…", subject to proper quantification. (Effron Ph. II Dir., GC Ex. 7.0 at 15). Likewise, while Staff witness Scott Struck opposed Liberty's *pro forma* adjustment (Struck Ph. II Reb., Staff Ex. 31.0 at 5), he also testified, that "if the Commission does adopt this adjustment, I agree with ComEd witness Hill and GC witness Effron that the corresponding rate base adjustment should be made as well." (*Id.*) Staff is correct. In light of the foregoing, the AG's BoE's assertion that "there is no evidence in the record explaining why capitalizing incentive compensation is appropriate in this case, and no facts that demand this accounting treatment" (AG BoE at 16) is incorrect.

The AG's complaint that Liberty's *pro forma* adjustment is based in part on an accounting change in 2001, the year after the test year (AG BoE at 16), misses the point. Liberty's adjustment is a *pro forma* adjustment, which are typically based on out-of-test year data. The AG cites no legal or factual basis on which Liberty's adjustment fails to meet the standards for a *pro forma* adjustment. In contrast, ComEd has shown that the basic rules regarding *pro forma* adjustments require the inclusion of these expenses in rate base if they are

[10] "GC" signifies the GCI plus the AG.

excluded from operating expenses on the ground that they should be capitalized rather than expensed. (Hill Ph. I Dir., ComEd Ex. 112.0 at 10-11, 29-30).

The AG is also correct that Liberty's proposed *pro forma* adjustment does not involve an issue of remedial expenses, and in that sense may be beyond the scope of the audit (AG BoE at 16-17), but that also does not support the AG's exception. ComEd timely and properly presented a correct and complete version of Liberty's *pro forma* adjustment in its Phase II direct testimony, as shown above. Because ComEd's correct and complete version of the adjustment meets the standards for a *pro forma* adjustment, a fact which the AG's BoE does not and cannot dispute, the AG's argument about the scope of the audit does not warrant rejection of this particular adjustment. In any event, the AG's argument would not support removing the costs from operating expenses while not including them in rate base.

Finally, the AG's proposed language, apparently inadvertently, recommends the exact opposite of what the AG argues, by inverting the language that the AG appears to intend to add and to strike out. (AG BoE, Ex. C). In any event, the AG has demonstrated no valid basis for its Exception, and it should be rejected.

C. <u>The ALJPO Correctly Addresses Customer Expenses</u>

The ALJPO correctly rejected certain customer-related disallowances proposed in the Audit Report on the grounds that they were beyond the scope of the audit. (ALJPO at 119-120). The AG's BoE takes exception to the ALJPO's ruling based on the argument that ComEd witness Jerome Hill gave "arbitrary" and "contradictory" testimony on this subject and that the ruling is contrary to the Interim Order. (AG BoE at 17-20, Ex. D). The AG's characterization of Mr. Hill's testimony is incorrect, and its Exception should be rejected.

The question of whether certain of Liberty's proposed adjustments were beyond the scope of the audit was first raised by GC witness David Effron in his Phase II direct testimony. (Effron Ph. II Dir., GC Ex. 7.0 at 16, 24-25). Mr. Effron contended that Liberty's proposed adjustments relating to capitalization of incentive compensation and reduced depreciation rates were beyond the scope of the audit. (*Id.*) Neither ComEd nor Staff addressed this "scope" issue in their Phase II direct testimony. However, in his Phase II rebuttal testimony, Mr. Hill noted that this scope analysis would also apply to various Liberty-proposed adjustments to ComEd's customer-related and A&G expenses. (Hill Ph. II Reb., ComEd Ex. 120.0 at 9-10). Mr. Hill added, however, that the revenue requirement proposed in ComEd's Phase II rebuttal testimony did not reject any of Liberty's proposed adjustments on that ground. (*Id.* at 10).

In its Phase II rebuttal testimony, Staff for the first time addressed the issue of whether any of Liberty's proposed adjustments were beyond the scope of the audit, in responding to Mr. Effron's Phase I direct testimony. (Struck Ph. II Reb., Staff Ex. 31.0 at 3-4, 5, 12-13, 16). Staff agreed with Mr. Effron. (*Id.*) Staff limited its analysis to the same two Liberty-proposed adjustments that Mr. Effron had discussed. (*Id.*) Thus, in his Phase II reply testimony, Mr. Hill for the first time had the benefit of both Mr. Effron's and Staff's testimony on the rejection of Liberty-proposed adjustments as beyond the scope of the audit. Mr. Hill, expressly based on his review of that testimony, agreed that Liberty's proposed adjustment relating to reduced depreciation rates should be rejected (Hill Ph. II Rep., ComEd Ex. 126.0 at 3, 8-9), and further testified that, based on the standards applied by Mr. Effron and Staff to that adjustment, certain Liberty-proposed customer-related disallowances also should be rejected as beyond the scope of the audit (*id.* at 4, 21-22).

The AG's characterizations of Mr. Hill's testimony as "arbitrary" and "contradictory" thus are inaccurate. Mr. Hill gave consistent testimony as to which Liberty-proposed adjustments were beyond the scope of the audit. Mr. Hill in his Phase II reply testimony did adopt additional recommendations, but he expressly did that based on reviewing not only Mr. Effron's Phase I direct testimony but also Staff's Phase II rebuttal testimony. (Hill Ph. II Rep., ComEd Ex. 126.0 at 3, 4, 8-9, 21-22). There simply is nothing wrong with Mr. Hill's changing certain of his recommendations when he had the benefit of reviewing Staff's rebuttal testimony. Moreover, the AG conducted extensive cross-examination of Mr. Hill on whether his testimony was consistent on this subject and why he had changed certain of his recommendations in his Phase II reply testimony, and Mr. Hill provided a detailed and compelling explanation (Hill, Tr. at 3841-54), which the AG's BoE does not mention.

The AG's BoE also makes the alternative argument that, even if the Liberty-proposed customer-related disallowances at issue are beyond the scope of the audit, they are not beyond the scope of Phase II of this proceeding based on language relating to FERC Accounts 580, 590, 592-94, and 903 (certain of the customer-related expenses at issue are charged to FERC Account 903) on page 84 of the Interim Order. (AG BoE at 19, 20). The AG does not quote that language, however, which actually states as follows:

> As previously discussed, the Commission has reviewed the evidence in the record now before us, and is mindful of the pendency of the audit ordered by the Commission in Docket No. 01-0664. The audit will consider many of the items included in ComEd's proposed revenue requirement, and the Commission expects the audit will provide additional evidence on these subjects. Therefore, the Commission makes no final findings concerning the proof of the prudence of any items in this Interim Order. However, based on the evidence now before us, the Commission concludes that Mr. Effron's normalization formulae are not warranted at this time.

(Interim Order at 84). That language is consistent with Mr. Hill's application of the audit "scope" standards developed and relied upon by Mr. Effron and Staff. Moreover, while the AG points to the Interim Order's summary of GC's position regarding the above FERC Accounts. (AG BoE at 19),the fact that the Interim Order on pages 79-81 summarized GC's position does not alter the above-quoted language on page 84 of the Interim Order.

D. Staff's Exception A – The Time Value of Money

Staff's Exception A requests (1) that a more complete description of the Phase II Rebuttal testimony of Staff witness Bruce Larson (Larson Ph. II Reb., Staff Exhibit 33.0) be included in the ALJPO, and (2) that the ALJPO be modified to address language that Staff believes represents an inappropriate use of hindsight in a proceeding concerning prudence and reasonableness of expenditures. (Staff BoE at 2-5). The Joint Parties have no objection to Staff's first request, but submit that Staff's second request should be denied.

The second request in Staff's Exception A incorrectly assumes that the findings on pages 63-65 of the ALJPO based on the testimony of Mr. Jacobs represent an inappropriate use of hindsight and should be stricken. (Staff BoE at 4-5). That is not the case. Neither the testimony of Mr. Jacobs nor the ALJPO's findings based on that testimony violate the prohibition against use of hindsight when assessing the prudence of utility decision making.

Staff's Exception fails to distinguish between (i) the assessment of the prudence of a utility's decisions and (ii) the quantification of the economic effects of a utility's decisions. The testimony of Mr. Jacobs deals with the latter, not the former. Mr. Jacobs explained this distinction at the outset of his testimony, when he stated:

- **There is a distinction between assessing prudence and quantifying disallowances**. The distinction between the assessment of prudence and the quantification of disallowances is similar to the distinction between the determination of liability and the assessment of damages in routine civil litigation. Often, civil litigation is conducted in two separate parts, assessing liability in one part, and measuring damages, if any, in the second part.

(Jacobs Ph. II Dir., ComEd Ex. 106.0 at 7) (emphasis in original).

Mr. Jacobs made clear that his testimony accepts and respects the prohibition against use of hindsight when assessing the prudence of a utility's decisions.

> • **Hindsight is not appropriate for assessing prudence**. The purpose of assessing prudence is to evaluate the reasonableness of management actions using information that would have been available to a reasonable manager at the time the decisions or actions were made. Hindsight is not appropriate in assessing the prudence of decisions or actions. Only information that was known or reasonably should have been known by the decision makers can be considered.

(Jacobs Ph. II Dir., ComEd Ex. 106.0 at 7) (emphasis in original).

Mr. Jacobs specifically stated that his testimony does not address the prudence of ComEd's decisions:

> ...my testimony is focused on the quantification of costs associated with the alleged imprudence identified by Liberty without judging the reasonableness of its findings of imprudence. Other witnesses for ComEd are addressing the issue of imprudence.

(Jacobs Ph. II Dir., ComEd Ex. 106.0 at 1).

All of the findings on pages 63 through 65 of the ALJPO that Staff seeks to strike deal with the time value of money analysis used by Mr. Jacobs to quantify the effects of Liberty's "capital smoothing" proposal. There is no principle of law that prohibits the use of actual historical information when preparing quantifications of the type presented by Mr. Jacobs, and Staff has cited no authority that would warrant striking the results of such a quantification from the Commission's decision. Mr. Jacobs accurately described the propriety of using actual historical information when quantifying the effects of proposed alternative courses of action:

> • **Actual cost information is appropriately used when measuring the economic consequences of actions, decisions or events.** If the relevant period for quantification includes an historical period, it is appropriate to use actual, historical cost information to conduct the quantification.

(Jacobs Ph. II Dir., ComEd Ex. 106.0 at 7). That is what Mr. Jacobs did in his testimony, it is what the ALJPO describes at 63-65, and it is entirely appropriate under Illinois law.

An analysis of the specific language that Staff seeks to strike from page 63 of the ALJPO further illustrates the absence of any basis for Staff's proposed deletion. For purposes of this analysis, the page 63 language can be considered in two segments. The first segment includes the entire paragraph from the middle of page 63 with the exception of the last sentence. That segment of the paragraph, which Staff seeks to strike, reads as follows:

> In addition, Liberty did not adjust its capital smoothing analysis to take into account the fundamental economic principle of the time value of money, which ComEd witnesses Kamien and Jacobs, as well as Staff witness Bruce Larson, agree must be taken into account. When the time value of money is taken into account, the evidence shows that Liberty's proposal to move $270 million of ComEd's 1999-2000 capital investments back in time to the 1993-1998 period actually increases costs by at least $35 million, even taking into consideration Liberty's allegation that approximately $49 million of "excess" overtime, expediting and project mismanagement costs were incurred to complete the work in 1999-2000. While, as indicated above, Liberty presented the factors it relied upon for taking a different view, we disagree with Liberty's view that such an adjustment for the time value of money is inappropriate in this instance. We conclude, based on the specific circumstances and evidence presented here, that such an adjustment is proper. Of course, rejecting this proposed adjustment in part on this basis does not weaken in any way the obligation of utilities to take prudent action to provide adequate and reliable service, which is discussed above. Nor does rejecting this proposed adjustment mean that the Commission is absolving ComEd of any failures it may have had to maintain the integrity and reliability of its distribution system.

(ALJPO at 63). There is absolutely nothing in this language that violates the prohibition against the use of hindsight when assessing the prudence of a utility's decisions. The language merely describes the results of the time value of money analysis that Mr. Jacobs performed to quantify the effects of Liberty's alternative "capital smoothing" investment pattern. The analysis shows that Liberty's alternative course of action would have been more costly, and therefore provides no basis for a disallowance of ComEd's actual capital expenditures.

In addition, the second segment of the page 63 paragraph that Staff also seeks to strike reads:

> This finding goes only to the prudence and reasonableness of ComEd's expenditures and investments.

It is this sentence, and only this sentence, that prompts Staff's Exception. Staff reads the sentence as violating the prohibition against the use of hindsight, when the entire paragraph preceding it shows that is not the case. But even if there were some ambiguity about the sentence or its placement in the paragraph, the solution would not be to strike the entire paragraph. If the Commission wished to address Staff's concern that the sentence might be misunderstood, it could simply strike the sentence. That is not a course of action that ComEd advocates or supports because it is not necessary. However, if Staff's argument were accepted, at most it would call for elimination of the one sentence that Staff finds troublesome. Elimination of the ALJPO's well-founded finding based on the analysis of Mr. Jacobs is simply not supported by anything that Staff has stated in its BoE.

A review of deletions Staff proposes for page 65 of the ALJPO similarly demonstrates the absence of any basis for Staff's position. Staff seeks to strike the following language:

> Finally, even if Liberty were correct that $42.6 million of "excess" costs were incurred on ComEd's 1999-2001 construction projects, it would not support a capital disallowance on the basis of an alleged increase in the utility's rate base. The time value of money analysis prepared by ComEd witness Morris Jacobs demonstrates that, even if such 'excess' costs were incurred, the cash flows from ComEd's actual construction schedule are significantly more economical than the cash flows from Liberty's alternative hypothetical 1993-1998 construction program. Again, we disagree with Liberty regarding the applicability of Mr. Jacobs' analysis to the particular facts presented in this case.

Staff argues that this language should be stricken because "it is incorrect for the [ALJPO] to take the position that the time value of money analysis supports a finding that ComEd acted prudently ..." (Staff BoE at 4). But there is nothing in this language that takes that position. The language does not state that the time value of money analysis performed by Mr. Jacobs supports the prudence of ComEd's 1993-1998 investment levels. Mr. Jacobs clearly stated that his testimony "is focused on the quantification of costs associated with the alleged imprudence identified by Liberty without judging the reasonableness of its findings of imprudence." (Jacobs Ph. II Dir., ComEd Ex. 106,0 at 1).

Quantification of the effects of Liberty's proposed alternative "capital smoothing" investment pattern is the subject of the Jacobs testimony and of the findings on page 65 of the ALJPO, just as it is the subject of the findings on page 63. The ALJPO states that a time value of money analysis is appropriate when performing such a quantification, and that conclusion is overwhelmingly supported by the record. Staff's proposal to strike the ALJPO's findings on this issue should be denied.

IV.
Technical Exceptions

A. GCI Exception – Prior Rulings Concerning Confidentiality

GCI has submitted an exception on this subject. (GCI BoE at 2-4). The Joint Parties support the language on this issue proposed in the Joint Proposed Order.

B. Staff Exception B – Retirements

Staff suggests that the $279,000 reduction in depreciation expense relating to the $11,060,000 adjustment for retirements due to replaced plant discussed on page 43 of the ALJPO may be in error, and should instead reflect a $277,000 depreciation expense adjustment. (Staff BoE at 5). The Joint Parties oppose this revision because the ALJPO is correct in stating that the depreciation expense adjustment relating to the replaced plant issue is $279,000. The $277,000 amount mentioned by Staff relates to a different adjustment -- the $11,038,000 adjustment for plant placed in service in the second quarter of 2001. Both adjustment amounts are reflected on page 2 of ComEd Exhibit 114.1 attached to the Phase II Supplemental Rebuttal Testimony of Jerome Hill. (Hill Ph. II Supp. Reb., ComEd Ex. 114; see also ALJPO, App. A, Sch. 2 at 1). ComEd Exhibit 114.1 shows that the $279,000 amount relates to replaced plant, which is associated with the $11,060,000 replaced plant adjustment shown on page 9 of ComEd Exhibit 114.1. (ALJPO, Appendix ["App."] A, Sch. 4 at 1). The $277,000 amount, on the other hand, relates to the $11,038,000 adjustment for plant placed in service in the second quarter of 2001, shown on page 10 of Exhibit 114.1. (ALJPO, App. A, Sch. 4 at 2).

C. Staff Exception C – ADIT

The Joint Parties agree with Staff's proposed modification (Staff BoE at 6) for page 65 of the ALJPO, striking the $1,156,000 accumulated deferred income tax adjustment amount and replacing it with $1,136,000.

D. Staff Exception D – Depreciation Expense Adjustment

The $8,147,000 depreciation expense adjustment amount shown on page 121 of the ALJPO was intended to be a net amount, reflecting both the $8,526,000 lower depreciation expense relating to audit adjustments and the $379,000 increase in depreciation expense relating to the capitalization of incentive compensation. However, the net amount is in error by $8,000. The Joint Parties have no objection to Staff's proposal (Staff BoE at 6-7) to strike the $8,147,000 depreciation expense adjustment amount on page 121 of the ALJPO and substitute the $8,526,000 amount suggested by Staff, provided that page 125 of the ALJPO discussing the capitalization of incentive compensation is revised to show separately the $379,000 reduction in depreciation expense relating to the capitalization of incentive compensation. (ALJPO, App. A, Sch. 2 at 6). The Joint Parties propose that page 125 be revised to read:

> The Commission also finds, based on the evidence in the record, that Liberty's $9,835,000 incentive compensation capitalization adjustment is

> supported by the facts, is reasonable and is therefore approved. Because the removal of $9,835,000 of incentive compensation from ComEd's distribution O&M expenses is based on the position that the amount should be capitalized, a corresponding upward adjustment in ComEd's rate base is appropriate and is approved as reflected in Appendix A, page 13 to this order, along with related adjustments of $1,401,000 to general and intangible plant, $315,000 to accumulated depreciation – distribution plant, $64,000 to accumulated depreciation – general and intangible plant, ~~and~~ $171,000 to accumulated deferred income taxes, and an increase of $379,000 in depreciation expense which are also approved as reflected in Appendix A~~, page 13~~.

E. Staff's Exception E – Tracking

Staff proposes (Staff BoE at 7-8) that the discussion of the cost of debt on page 126 of the ALJPO be modified to reflect ComEd's agreement (stated on pages 97-98 of its Initial Brief filed in Phase I) to continue to track and record separately the unamortized balance and annual amortization of original debt discount and premium in the event that the information is needed in future rate cases. (Staff BoE at 7-9). The Joint Parties have no objection to the modification proposed by Staff. ComEd's notes that its Phase I Initial Brief explains that this agreement was made in connection with the resolution of the cost of debt to be used for purposes of this proceeding and that ComEd's agreement to Staff witness Ms. Freetly's recommended 6.95% cost of long term debt was made "[w]ithout conceding the merit of the arguments made in opposition to ComEd's approach, in order to narrow the issues in this proceeding...." (ComEd Ph. I Initial Brief at 102).

Conclusion

For the reasons stated herein, the ALJPO is lawful and supported by the evidence, and it should be adopted by the Commission.

DATED: March 26, 2003

Respectfully submitted,

Building Owners and Managers Association of Chicago

By: ______________________________

Commonwealth Edison Company

By: ______________________________

MidAmerican Energy Company

By: ______________________________

National Energy Marketers Association

By: ______________________________

Constellation NewEnergy, Inc.

By: ______________________________

Peoples Energy Service Corporation

By: ______________________________

TrizecHahn Office Properties, Inc.

By: ______________________________

Conclusion

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DATED: March 26, 2003

Respectfully submitted,

Building Owners and Managers Association of Chicago

By:______________________________

Commonwealth Edison Company

By: Paul F. Hanzlik

MidAmerican Energy Company

By:______________________________

National Energy Marketers Association

By:______________________________

Constellation NewEnergy, Inc.

By:______________________________

Peoples Energy Service Corporation

By:______________________________

TrizecHahn Office Properties, Inc.

By:______________________________

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Respectfully submitted,

Building Owners and Managers Association of Chicago

By:______________________________

Commonwealth Edison Company

By:______________________________

MidAmerican Energy Company

By: Robert P. Jared
(By PRH)

National Energy Marketers Association

By:______________________________

Constellation NewEnergy, Inc.

By:______________________________

Peoples Energy Service Corporation

By:______________________________

TrizecHahn Office Properties, Inc.

By:______________________________

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By:________________________

TrizecHahn Office Properties, Inc.

By:________________________

Conclusion

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National Energy Marketers Association

By:____________________________

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By:____________________________

Peoples Energy Service Corporation

By:____________________________

TrizecHahn Office Properties, Inc.

By:____________________________

Conclusion

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By:____________________________

Commonwealth Edison Company

By:____________________________

MidAmerican Energy Company

By:____________________________

National Energy Marketers Association

By:____________________________

Constellation NewEnergy, Inc.

By:____________________________

Peoples Energy Service Corporation

By: Mary Klyasheff
Gerard T. Fox
Mary Klyasheff

TrizecHahn Office Properties, Inc.

By:____________________________

Conclusion

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DATED: March 26, 2003

Respectfully submitted,

Building Owners and Managers Association of Chicago

By:____________________________

Commonwealth Edison Company

By:____________________________

MidAmerican Energy Company

By:____________________________

National Energy Marketers Association

By:____________________________

Constellation NewEnergy, Inc.

By:____________________________

Peoples Energy Service Corporation

By:____________________________

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CERTIFICATE OF SERVICE

I, E. Glenn Rippie, do hereby certify that I caused a copy of the foregoing Joint Reply Brief on Exceptions of the Building Owners and Managers Association of Chicago, Central Illinois Light Company, Commonwealth Edison Company, Constellation NewEnergy, Inc., MidAmerican Energy Company, National Energy Marketers Association, Peoples Energy Services Corporation, and Trizec Properties, Inc. to be served upon all parties on the attached Service List by electronic mail on or before Noon on this 26th day of March 2003. Hard copies will be mailed to all parties that do not accept electronic service only as indicated by an asterisk (*) on the attached service list by deposit in the United States mail, first class postage prepaid, at 321 N. Clark Street, Suite 1500, Chicago, Illinois 60610 on this 26th day of March 2003.

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